

No. 22-179

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IN THE  
**Supreme Court of the United States**

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UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

HELAMAN HANSEN,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER  
FOUNDATION, IMMIGRANTS RISING, DEFENDING  
RIGHTS & DISSENT AND WOODHULL FREEDOM  
FOUNDATION IN SUPPORT OF RESPONDENT**

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**STATEMENT OF INTERESTS OF *AMICI CURIAE***<sup>1</sup>

*Amici curiae* represent a variety of stakeholders united in their concern that the federal criminal prohibition in 8 U.S.C. § 1324(a)(1)(A)(iv) silences constitutionally protected speech, and if upheld here, will throw into doubt the legality of multitudes of online speech about immigration and directed at immigrants. *Amici*—a digital rights advocacy organization, an immigrant services organization, and free speech organizations—represent both the speakers themselves as well as the intermediaries that make such speech possible. Because of the statute’s broad and ambiguous scope, *amici*—along with other direct online speakers in support of immigrant rights and the platforms that host such content—face the risk of criminal liability.

The Electronic Frontier Foundation (“EFF”) is a nonprofit organization that has worked for more than 30 years to protect free speech and civil liberties in the digital world. EFF and its more than 38,000 active donors have a powerful interest in ensuring that the Internet serves as a venue for free speech and the open communication of ideas for all users.

Immigrants Rising is a fiscally-sponsored project of Community Initiatives, a nonprofit organization. Founded in 2006, Immigrants Rising provides resources to empower

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1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission.

undocumented people to achieve their educational and career goals through personal, institutional and policy transformation. Immigrants Rising offers a website aimed at undocumented people that provides information on financial resources for higher education, building and managing a business, and immigration legal assistance.

Defending Rights & Dissent (“DR&D”) is a national civil liberties organization whose mission is to strengthen our participatory democracy by protecting the right to political expression. DR&D believes that today the internet serves as our town square, where matters of public concern are debated. It is vital to our democracy that it remains open for the exchange of ideas and free speech.

The Woodhull Freedom Foundation (hereinafter “Woodhull” or the “Foundation”) is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. The Foundation’s name was inspired by the Nineteenth Century suffragette and women’s rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull’s mission is focused on affirming sexual freedom as a fundamental human right. The Foundation’s advocacy has included a wide range of human rights issues, including reproductive justice, anti-discrimination legislation, comprehensive nonjudgmental sexuality education, and the right to define ones’ own family. Woodhull is particularly concerned with broad sweep of the Encouragement Provision which criminalizes speech based on its content. Since such content-based restrictions frequently target

sexually oriented expression, Woodhull fears that if the Encouragement Provision is upheld, similar legislation will be used to censor such expression, to the detriment of Woodhull’s mission.

### SUMMARY OF ARGUMENT

As this Court has recognized, the Internet is where people “engage in a wide array of protected First Amendment activity on topics as diverse as human thought.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (citation omitted). Unsurprisingly immigrant rights advocates and services providers use the Internet to share messages of hope and provide resources that allow undocumented immigrants to make better lives for themselves—all of which can be seen as “encouragement,” and thus illegal, under the Encouragement Provision, 8 U.S.C. § 1324(a)(1)(A)(iv).

This brief focuses on how the Encouragement Provision threatens constitutionally protected online speech. First, the variety and prevalence of speech online supporting immigrants and the ease of amplifying such speech illustrates the Encouragement Provision’s uncertain and overly broad sweep. Second, by prohibiting an enormous amount of commonplace speech, the Encouragement Provision also burdens the online platforms that host this type of speech, exacerbating the censorial effect. Given the vast amount of content even smaller platforms handle, platforms face great difficulty in enforcing finely drawn legal distinctions on a case-by-case basis. They will thus be incentivized to censor a vast amount of protected speech about immigration in order to manage their risk of liability should they cross the uncertain line that is “encouragement.”

This Court should affirm the Ninth Circuit, which correctly recognized the sweeping breadth of speech, including commonplace statements, that the Encouragement Provision encompasses: “encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants” and is unconstitutional. *United States v. Hansen*, 25 F.4th 1103, 1110 (9th Cir. 2022).

### ARGUMENT

Shortly after this Court heard oral arguments in *Department of Homeland Security v. Regents of the University of California*,<sup>2</sup> thousands of Twitter users weighed in on the case using the hashtags #HereToStay and #HomeIsHere. People from across the country tweeted out in support of undocumented youth, emphasizing that immigrants make the country stronger, that the United States is their home, and that undocumented immigrants should continue to reside here. Among them was Julián Castro, former Secretary of Housing and Urban Development and, at the time, a presidential candidate, who shared:

*Home is here.*

*Roots have been planted here.*

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2. 140 S. Ct. 1891 (2019).

*Families have been created here.*

*Degrees have been earned here.*

*Dreams have been built here.*

*Futures are here.*

*#HomeIsHere.*

*And dreamers<sup>3</sup> are #HereToStay*

*@JulianCastro, Twitter (Nov. 12, 2019, 3:06 PM).<sup>4</sup>*

The Encouragement Provision makes tweeting this message a federal crime. Moreover, the inherent nature of social media means that a wide range of speakers beyond Secretary Castro himself, including anyone who liked or retweeted it or posted a supportive reply, and Twitter itself, which provided the platform for this encouragement, face a risk of criminal liability under the Encouragement Provision.

Given its interactive nature, international reach, and the capacity for both one-to-one and mass real-time communications, the Internet is an especially effective medium for the protected speech that the Encouragement Provision chills. As this Court has recognized, the “vast

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3. Recipients of Deferred Action for Childhood Arrivals (“DACA”) are often referred to as “Dreamers.”

4. <https://twitter.com/JulianCastro/status/1194391098606665730>.

democratic forums of the Internet” have become one of the “most important places . . . for the exchange of views” today. *Packingham*, 137 S. Ct. at 1735 (citation omitted).

So, it is not surprising that the Internet plays a vital role in the transmission of information to noncitizens seeking to enter or remain in the country, whether they seek to do so lawfully or unlawfully.

“Encouraging” speech directed to noncitizens seeking to enter or remain in the United States without legal authorization is found across the Internet, not merely on social media platforms. Websites, applications, cloud-based document-sharing systems, and messaging services abound with such speech. And the speakers represent a wide range of interests, from concerned private individuals to governmental officials, from advocacy organizations to noncitizens themselves.

The clear overbreadth and ambiguity of the Encouragement Provision thus poses special threats to online speech.

## **I. THE ENCOURAGEMENT PROVISION’S BROAD SWEEP THREATENS THE SPEECH OF IMMIGRATION ADVOCACY AND SERVICES ORGANIZATIONS ONLINE**

Advocacy and service organizations use a wide variety of online tools to provide information to both the general public and noncitizens specifically.

Hundreds of community-based organizations utilize websites to provide undocumented immigrants with



resources about how to obtain healthcare, housing, and other services.

Amicus Immigrants Rising provides a number of online resources for undocumented people, including:

- Information about undergraduate and graduate scholarships;
- In-State Tuition Tool, a survey that helps determine whether a student qualifies for in-state tuition in California and advises on how to achieve future eligibility;
- Resources on entrepreneurship opportunities and how immigrant entrepreneurs can protect their assets;
- Mental Health Connector, a questionnaire that connects young people with psychological support; and
- Legal Intake, a survey to learn about possible immigration options.<sup>5</sup>

Many other organizations provide materials on their websites to inform undocumented immigrants about their legal rights. Informed Immigrant maintains a Know Your Rights section in its online resource library with a wide range of information for undocumented immigrants and their families, including information about their rights

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5. Immigrants Rising, *Resources*, <https://immigrantsrising.org/resources/>.

inside and outside their homes, what to do if someone you know is arrested, how to prepare your family in the event of an immigration raid, and guidance for finding a lawyer.<sup>6</sup> Their website also includes information for immigrants' medical providers<sup>7</sup> and about common scams targeting immigrants,<sup>8</sup> how to prepare for an immigration raid, and about digital security.<sup>9</sup> The National Immigration Law Center offers similar resources as well as information about participating in demonstrations.<sup>10</sup> NAKASEC, an organization working with and on behalf of Asian American immigrants, provides a downloadable Know Your Rights flyer in both English and Korean.<sup>11</sup> Each organization accurately informs undocumented immigrants of their basic legal rights, including that they need not answer questions if law enforcement asks about their immigration status and should not open their door if

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6. Informed Immigrant, *Know Your Rights*, <https://www.informedimmigrant.com/resources/know-your-rights/know-your-rights/>.

7. [https://www.informedimmigrant.com/resources/know-your-rights/linking to](https://www.informedimmigrant.com/resources/know-your-rights/linking-to), Nat'l Immigration Law Ctr., *Health Care providers and Immigrant Enforcement*, <https://www.nilc.org/issues/immigration-enforcement/healthcare-provider-and-patients-rights-imm-enf/>.

8. <https://www.informedimmigrant.com/resources/know-your-rights/>.

9. <https://www.informedimmigrant.com/resources/know-your-rights/>.

10. Nat'l Immigration Law Ctr., *Know Your Rights*, <https://www.nilc.org/get-involved/community-education-resources/know-your-rights/>.

11. NAKASEC, *Know Your Rights!*, <https://nakasec.org/rights>; <https://nakasec.org/ko/rights>.

immigration officers come to their home without a search or arrest warrant.

Interactive social media sites are also rich sources of information for undocumented immigrants. They allow users to solicit advice from other users regarding immigration matters, develop personal relationships with those with expert knowledge, cultivate a support community, and otherwise seek out assistance.

Reddit, a social news aggregation and discussion website, averaged over 1.5 billion monthly visits for the first half of 2022, with almost half of those visits originating in the United States.<sup>12</sup> Users can submit posts to boards arranged by topic, known as “subreddits.” The Immigration subreddit has about 66,000 members, and users submit and respond to posts seeking advice on immigration matters.<sup>13</sup> On any given day, several of the top threads include questions about whether and how an undocumented immigrant can remain in the United States. For example, in one post, a user asked whether their undocumented parents could fly within the United

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12. Statista, *Worldwide visits to Reddit.com from December 2021 to May 2022*, <https://www.statista.com/statistics/443332/reddit-monthly-visitors/> (last visited February 20, 2023); Statista, *Regional distribution of desktop traffic to Reddit.com as of May 2022*, <https://www.statista.com/statistics/325144/reddit-global-active-user-distribution/> (last visited February 20, 2023).

13. See Reddit, Immigration Subreddit, <https://www.reddit.com/r/immigration/>. Visa Journey, a website that bills itself “America’s Largest Immigration Community,” also provides similar functionality. See Visa Journey, *US Immigration Forums*, <https://www.visajourney.com/forums>.

States.<sup>14</sup> Other users responded, “Yes they can!” and “they can try.” Through these threads, users often receive advice about their immigration options, including coming into or remaining in the United States without authorization.

Tweets assuring undocumented immigrants that their #HomeIsHere and that they are #HereToStay are common and are intended to inspire, inspirit, embolden, and give hope or courage to those facing deportation.

Social media executives have themselves participated in the conversations on their own platforms.<sup>15</sup>

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14. Reddit, *Can undocumented people fly within the US with a Mexican passport and no visa?* (posted September 17, 2022), [https://www.reddit.com/r/immigration/comments/xg82f9/can\\_undocumented\\_people\\_fly\\_within\\_the\\_us\\_with\\_a/](https://www.reddit.com/r/immigration/comments/xg82f9/can_undocumented_people_fly_within_the_us_with_a/).

15. See, e.g., Alexis Ohanian, *An Open Letter to the Reddit Community*, Reddit, Jan. 30, 2017, [https://www.reddit.com/r/blog/comments/5r43td/an\\_open\\_letter\\_to\\_the\\_reddit\\_community/](https://www.reddit.com/r/blog/comments/5r43td/an_open_letter_to_the_reddit_community/) (Reddit founder and executive chairman stating that “Reddit, Inc. will continue to welcome all citizens of the world to our digital community and our office,” and inviting Reddit users to share their own immigration stories and receiving 30,900 responses); @Twitter, Twitter (Jan. 28, 2017, 5:20 PM), <https://twitter.com/twitter/status/825513865794293761> (Twitter’s official company account stating: “Twitter is built by immigrants of all religions. We stand for and with them, always.”; and receiving 10,000 responses); Taylor Lorenz, *Zuckerberg Debates Immigration with Facebook Commenters*, The Hill, Sept. 1, 2017, <https://thehill.com/blogs/ballot-box/348865-mark-zuckerberg-debates-immigration-with-facebook-commenters> (reporting that Facebook founder and CEO Mark Zuckerberg publicly expressed support for DACA and debated immigration with members of the public on Facebook).

The Encouragement Provision, on its face,<sup>16</sup> prohibits all these examples of speech found across the Internet: speech informing undocumented immigrants about their legal rights when conversing with immigration agents; speech directing undocumented immigrants to resources that will allow them to build meaningful and productive lives within the United States; all speech that similarly emboldens undocumented immigrants to remain within the country, and all speakers who inspire and enable immigrants to remain in the country, and give immigrants hope that this country wants them here.

As the Ninth Circuit correctly found, the Encouragement Provision bans exactly what it says: “inspiring, helping, persuading, or influencing” noncitizens regarding the prospect of residing unlawfully in the United States. Pet. App. 9a. Even the government agrees that “encourage” includes “embolden.” Pet. Rep. at 7 (citing *Black’s Law Dictionary* 644 (10<sup>th</sup> ed. 2014)). And, regardless of the government’s claim that it will not prosecute this type of speech, the existence of the Provision still thrusts such speech into legal uncertainty with the risk of criminal punishment. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (“But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”) The government’s assurance rings especially hollow because immigration policy positions

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16. On its face, the provision is not simply an aiding and abetting provision. Congress knows how to write an aiding and abetting statute and uses those specific terms when it intends to do so, and then provides additional guidance on what acts might constitute aiding and abetting. *See, e.g.*, 18 U.S.C. § 2(a).

vary among prosecutors across the country, and often change, sometimes dramatically, with different political administrations.<sup>17</sup> Our nation's profound commitment to uninhibited, robust, and wide-open debate on public issues cannot permit such uncertainty about whether one will be punished for speaking. *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

These concerns remain even if this Court were to limit the Encouragement Provision to one-to-one communications, as the government now urges. *See* Pet. Br. at 26-27. There is, of course, nothing in the statutory language that gives online speakers the comfort of this limitation; nevertheless, it would offer little help.<sup>18</sup>

The Know Your Rights Guides discussed above are not simply general, factual information for a disinterested public. They are designed to provide information to specific people who might need it, functionally indistinct from one-to-one communications. And they commonly invite individuals to inquire further and seek out

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17. Aid volunteers and immigration advocates have been prosecutorial targets in the recent past. *See* Associated Press, *Arizona Border Activist Acquitted of Harboring Immigrants*, Nov. 20, 2019, <https://apnews.com/article/arizona-immigration-us-news-ap-top-news-az-state-wire-1e3943f0b4f64acfa01f524aeaab9bde>; Rafael Carranza, *Aid Volunteers Found Guilty of Dropping Off Water, Food for Migrants in Protected Part of Arizona Desert*, Arizona Republic, Jan 18, 2019, <https://www.azcentral.com/story/news/2019/01/18/no-more-deaths-volunteers-found-guilty-dropping-water-food-migrants-cabeza-prieta-refuge-arizona/2617961002/>.

18. Amici disagree that the statute can reasonably be read to be limited to one-to-one communications, and support Respondent's argument to the contrary. Resp. Br. at 17-18.

personalized advice or to inquire for further information, often providing contact email addresses or web forms for an undocumented person to submit specific questions or seek further resources.

For example, as noted above, amicus Immigrants Rising has a resource on its website that “helps you determine whether you qualify for in-state tuition (AB 540/SB 68) in California!”<sup>19</sup> and an Immigration Legal Intake Service also designed to provide personalized resources.<sup>20</sup> NAKASEC maintains a 24-hour hotline for individual immigrants to call.<sup>21</sup>

And under the government’s interpretation it would still be unlawful to respond, for example, to a Reddit thread started by a person identifying as an undocumented immigrant and in the response link to any of the Know Your Rights resources mentioned above and other accurate, online resources. The social, interactive aspect of social media would carry great risk whenever one interacted with an undocumented immigrant.

Lastly, the uncertainty surrounding the “financial gain” enhancement exacerbates the statute’s problems. Most platforms rely on revenue from ads they place alongside content they host; for example, the platform sells the ad space that appears next to

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19. <https://immigrantsrising.org/in-state-tuition-tool/> (last visited February 21, 2023).

20. <https://immigrantsrising.org/legalintake/> (last visited February 21, 2023).

21. <http://nakasec.org/hotline> (last visited February 21, 2023).

an immigration advocacy organization’s post that “encourages” unlawful immigration.<sup>22</sup> *See Doe v. Twitter*, 558 F. Supp. 3d 889, 924 (N.D. Cal 2021) (finding 18 U.S.C. § 1595 beneficiary claim well pled based on allegations that Twitter “monetizes” user content through advertising), *abrogated on other grounds by Does 1-6 v. Reddit*, 51 F. 4th. 1137, 1142-43 (9th Cir. 2022).

Platforms are thus discouraged from publishing, and thus “monetizing,” immigration-related content. Other users will lose ad revenue that platforms share with them<sup>23</sup> or money they earn by using the platforms for fundraising or other business purposes. *Cf. Woodhull Freedom Foundation v. United States*, 948 F.3d 363, 374 (D.C. Cir. 2020) (finding that a nonsexual massage therapist had standing to challenge the constitutionality of FOSTA since he lost his ability to advertise his services when Craigslist shut down its “personal services” listings in response to the law’s passage).

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22. Greg McFarlane, *How Facebook (Meta), Twitter, Social Media Make Money From You*, Investopedia (Dec. 2, 2022), <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx>; Bennett Cyphers, *The Bipartisan Digital Advertising Act Would Break Up Big Trackers*, EFF (June 23, 2022), <https://www.eff.org/deeplinks/2022/06/bipartisan-digital-advertising-act-would-break-big-trackers> (breaking down the digital advertising industry).

23. Amanda Silberling, *YouTube targets TikTok with revenue sharing for Shorts, Partner Program expansion*, TechCrunch (Sept. 20, 2022), <https://techcrunch.com/2022/09/20/youtube-targets-tiktok-with-revenue-sharing-for-shorts-partner-program-expansion> (discussing the “Partner Program, which allows creators to earn ad revenue from YouTube”).



## II. PROTECTED ONLINE SPEECH ABOUT IMMIGRATION IS ESPECIALLY VULNERABLE TO THE ENCOURAGEMENT PROVISION'S VAGARIES BECAUSE ONLINE SPEAKERS RELY ON NUMEROUS RISK-ADVERSE INTERMEDIARIES

Even the hardest of online speakers, who themselves are not chilled by the law's expansive and uncertain reach, may nonetheless lose the ability to reach their audiences because the law also applies to the online intermediaries upon which all online speakers rely.

Internet speakers rely on web hosts, social media platforms, domain name registers, security-service providers, and many other intermediaries. Speakers won't be able to reach their audiences if the encouragement provision discourages even one of these intermediaries.<sup>24</sup>

To avoid the risk of criminal penalties and the burden of having to defend even meritless charges, risk-adverse intermediaries commonly censor users' speech that even approaches the line between lawful and unlawful speech.

This is partly caused by the inherently imperfect nature of content moderation. Intermediaries commonly restrict all speech about a topic rather than spending the massive amounts of money and resources needed to try to distinguish lawful from unlawful speech. *See Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d

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24. Section 230 does not immunize online intermediaries from federal criminal legal liability arising from their users' speech. 47 U.S.C. § 230(e)(1).

413, 418-19 (1st Cir. 2007) (citing cases). When Congress banned online speech related to sex work, for example, Facebook, Tumblr, Craigslist, and other online platforms stopped hosting content far beyond the law’s prohibition, thus pushing out a variety of content creators and users.<sup>25</sup>

Online intermediaries, even the smallest ones, commonly deal with a staggering volume of expression. Although these companies are quite clearly aware that debate over immigration is occurring through their services, and that undocumented immigrants are undoubtedly among the sometimes billions of users of their services, it would require a monumental dedication of resources to monitor how each of their users<sup>26</sup> engage on

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25. See, e.g., Craigslist, FOSTA, <https://www.craigslist.org/about/FOSTA>; Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know It*, Vox, July 2, 2018, <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>; Aaron Mackey, *The Fight to Overturn FOSTA, an Unconstitutional Internet Censorship Law, Continues*, EFF (Sept. 15, 2018), <https://www.eff.org/deeplinks/2022/09/fight-overturn-fosta-unconstitutional-internet-censorship-law-continues>; Paige Collings, *No Nudity Allowed: Censoring Naked Yoga*, EFF (Dec. 19, 2022), <https://www.eff.org/deeplinks/2022/12/no-nudity-allowed-censoring-naked-yoga>; Daisy Jones, Vogue (Jan. 29, 2023), *Instagram Might Finally Be About to Free the Nipple. What Took So Long?*, <https://www.vogue.com/article/free-the-nipple-instagram>.

26. See Emily Vogels, et al., *Teens, Social Media and Technology 2022*, Pew Research Center (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022> (67% of American teenagers ages 13 to 17 use TikTok); S. Dixon, *Number of monthly active Facebook users worldwide as of 4th quarter 2022*, Statista (Feb. 13, 2023), <https://www.statista.com/statistics/264810/number-of-monthly-active->

the topic. Already, to enforce internal standards for user speech, platforms necessarily rely on their users to flag content that violates the platforms' standards.<sup>27</sup> At large platforms, thousands of staff and contractors then review the flagged material, often making snap judgments about each item in order to get through the enormous volume of material awaiting review.<sup>28</sup> At smaller ones, where such staffing is impossible, employees may simply honor all takedown demands, no matter how legally unfounded.<sup>29</sup> It is simply not conceivable that intermediaries would, or could, dedicate the human labor that would be needed to sift through the enormous volume of speech shared on their platforms to remove speech that encourages noncitizens to reside in the United States unlawfully.

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facebook-users-worldwide (Facebook has 2.96 billion monthly active users as of the fourth quarter of 2022).

27. See, e.g., Kate Crawford and Tarleton Gillespie, *What Is a Flag For?: Social Media Reporting Tools and the Vocabulary of Complaint*, New Media & Society (2014), <https://pdfs.semanticscholar.org/96e8/d4d6f325b9173fba4d17aadf1c5c6f48edbe.pdf> (describing user flags as “a ubiquitous mechanism of governance” online).

28. See Casey Newton, *The Trauma Floor*, The Verge, Feb. 25, 2019, <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>; Sarah T. Roberts, *Meet the People Who Scar Themselves to Clean Up Our Social Media Networks*, Macleans, June 15, 2018, <https://www.macleans.ca/opinion/meet-the-people-who-scar-themselves-to-clean-up-our-social-media-networks/>.

29. See Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice*, Univ. of Cal.–Berkeley Public Law Research Paper No. 2755628 (March 22, 2017), at 41 (noting some platforms that honor all requests).

And where platforms face the threat of criminal penalties, community policing like this inevitably results in the heckler’s veto, whereby any user can effectively censor another user by notifying the intermediary that the other user’s speech is unlawful, regardless of the merits of that notice; the complainant knows the intermediary will take the post down rather than incur the expense of investigating or analyzing the notice. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997) (explaining that law prohibiting indecent messages to minors online “would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech”).<sup>30</sup>

Here the heckler’s veto is of special concern because of the Encouragement Provision’s broad and uncertain scope. Intermediaries have little incentive to expend enormous effort and resources sifting through a massive volume of speech in order to precisely identify user speech that is unlawful under the Encouragement Provision. Instead, platforms seeking to minimize their own criminal exposure under the statute are likely to simply censor all expression about immigration wholesale, or—perhaps even more troublingly—remove all expression favoring an immigration policy based on principles of inclusion and decriminalization because such expression is likeliest to violate the statute, while allowing speech favoring more restrictive and punitive immigration policies to remain online.<sup>31</sup>

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30. Cf. Corynne McSherry, *Platform Censorship: Lessons From the Copyright Wars*, EFF (Sept. 26, 2018), <https://www.eff.org/deeplinks/2018/09/platform-censorship-lessons-copyright-wars> (“[S]ervice providers will usually respond to a DMCA takedown notice by quickly removing the challenged content.”)

31. The Prohibition’s “intent or effect of favoring some ideas over others . . . raises the specter that the Government may

Artificial intelligence and algorithms do little to help. Such tools have consistently proved faulty, and remove content with little to no transparency or public oversight.<sup>32</sup> Drawing the line between speech that lawfully discusses immigration issues from speech that, under the Encouragement Provision, unlawfully expresses encouragement for noncitizens to reside in the country, is a daunting enough task for a human being, and an impossible one for a machine, even if it were clear what the Encouragement Provision criminalized.

Thus, even users seeking to engage in lawful speech about immigration may find themselves refused entry to the modern public square, stifling debate over one of the most important public issues confronting the nation today.

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effectively drive certain ideas or viewpoints from the marketplace.” *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) (citation omitted). Such laws are constitutionally suspect and subject to the most exacting form of scrutiny. *Id.*

32. See generally Abdul Rahman Al Jaloud, Hadi Al Khatib, Jeff Deutch, Dia Kayyali, and Jillian C. York, *Caught in the Net: The Impact of “Extremist” Speech Regulations on Human Rights Content* (May 2019), [https://www.eff.org/files/2019/05/30/caught\\_in\\_the\\_net\\_whitepaper\\_2019.pdf](https://www.eff.org/files/2019/05/30/caught_in_the_net_whitepaper_2019.pdf) (explaining that automated take-down systems are inaccurate and opaque, and describing effect on marginalized speakers). See also Bijan Stephen, *Porn: You Know It When You See It, But Can A Computer?*, *The Verge*, Jan. 30, 2019 <https://www.theverge.com/2019/1/30/18202474/tumblr-porn-ai-nudity-artificial-intelligence-machine-learning> (explaining difficulty in training artificial intelligence to parse content).

**CONCLUSION**

The Encouragement Provision threatens to stifle the free exchange of ideas online about one of the most contentious and important political questions of our time. Such a result is antithetical to our nation's unique and profound commitment to the protection of speech. In light of the foregoing, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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